



Tribunal Arbitral du Sport
Court of Arbitration for Sport

CAS 2009/A/1802 WADA v/CONI & Perotto

ARBITRAL AWARD

Pronounced by the

COURT OF ARBITRATION FOR SPORT

Sitting in the following composition:

President: Professor Michael Geistlinger, Salzburg, Austria

Arbitrators: Mr Michele A. R. Bernasconi, Attorney-at-law, Zurich, Switzerland
Mr Maurizio Cohen, Attorney-at-law, Monaco

in the arbitration between

World Anti-Doping Agency, Lausanne, Switzerland

Represented by Dr François Kaiser, Attorney-at-law, Lausanne, Switzerland

- Appellant -

and

Comitato Olimpico Nazionale Italiano (CONI),

Represented by Dr Ettore Torri, Head of the Anti-Doping Prosecutor Office of CONI, Rome, Italy

- first Respondent -

and

Ms Elena Perotto, Feltre, Italy

- second Respondent -

I. THE PARTIES

1. The World Anti-Doping Agency (hereinafter referred to as “WADA”) is a Swiss private law Foundation, seated in Lausanne, Switzerland and has its headquarters in Montreal, Canada. Pursuant to art 4.1. of its Statutes, as approved in March 2008, WADA shall promote and coordinate at international level the fight against doping in sport in all its forms including through in and out-of-competition testing. According to art 4.7. of these Statutes, WADA shall “*promote harmonized rules, disciplinary procedures, sanctions and other means of combating doping in sport, and contribute to the unification thereof, taking into account the rights of the athletes;*”.
2. The Comitato Olimpico Nazionale Italiano (hereinafter referred to as “CONI”), the Italian National Olympic Committee, is a public entity seated in Rome, Italy, which according to art 1 of its Statutes, dated 26 February 2008, is the Italian confederation of the Italian sport federations and associated sport disciplines. According to art 2 para 1 of its Statutes CONI takes care of and coordinates the sport activity on Italian territory. It is committed to a doping-free sport and prevents and suppresses the use of prohibited substances and methods in sport. It has acceded to the World Anti-Doping Code (hereinafter referred to as “WADC”) and is the Italian National Anti-Doping Organisation (“NADO”), recognized as such by WADA (see book 1 para 1/ art i of the Norme Sportive Antidoping (Sport Anti-Doping Rules), approved by the National Council of CONI on 30 June 2005 as of 23 January 2008, 23 July 2008 and 23 December 2008).
3. Ms Elena Perotto has been born on 16 August 1964, is resident in Feltre, Italy, and is an amateur cyclist of the veteran category belonging to the ASD Pedale Feltrino Team Bunny Hop in Feltre which is affiliated with UDACE – CSAIN (Unione Degli Amatori Ciclismo Europeo – Centri Sportivi Aziendali e Industriali). UDACE according to its Statutes of 27/28 October 1973 as last time amended on 27 October 2000 is a non-profit federation pursuing *inter alia* the purposes of promoting and practicing the sport of cycling as a social and recreation activity. UDACE is holding the status of a sport promotion cooperation and is a member of CSAIN, which is a non-profit organisation aiming at the promotion of sport, cultural, charitable and recreation activities in the leisure time and thereby emphasizing the role of sport as a recreation and educative activity (see art 2 of its Statutes as announced on www.csain.it). CSAIN has been recognized by CONI as a sport promotion corporation under title 6 of its Statutes with resolution dated 22 February 1979 pursuant to art 31 of DPR n° 530/74, confirmed by resolution of the CONI National Board n° 1224 of 15 May 2002. Ms Perotto, thus, does not have the status of a member (“soggetto tesserato”) to an Italian Sport Federation (“FSN”) or Associated Sport Discipline (“DSA”).

II. FACTS

4. On 11 October 2008, at the final of Gran Fondo d’Italia, a cycling race in Carpi under the authority of UDACE-CSAIN, Ms Perotto had to undergo a doping control which had been ordered by the Ministerial Commission according to the Italian act n° 376/2000. The analysis of the bodily sample of Ms Perotto showed the presence of 19-Norandrosterone and 19-Noretiocholanolone. Both substances are Endogenous Anabolic Androgenic Steroids that appear on the WADA 2008 (as well as 2009) List of

Prohibited Substances under class S1, Anabolic Agents, and are forbidden in and out of competition when administered exogenously. The exogenous use of 19-Norandrosterone was established by the Anti-Doping Laboratory in Rome having detected that the concentration of this substance in the bodily sample of Ms Perotto was greater than 2 ng/ml. There is no explicit reference in the laboratory report with regard to the exogenous use of 19-Noretiocholanolone.

5. Ms Perotto did not challenge the presence of the prohibited substances in her bodily sample and did not benefit of a Therapeutic Use Exemption whatsoever. On the doping control form Ms Perotto indicated two therapy-sessions in the respective week and the intake of and non-specified anti-inflammatories.
6. The results of the laboratory analysis of Ms Perotto's sample were communicated by the Italian Ministry of Labour, Health and Social Policy to the Anti-Doping Prosecutor Office of CONI on 14 November 2008. The Anti-Doping Prosecutor Office of CONI initiated a disciplinary proceeding, in the course of which on 9 December 2008 Ms Perotto explained that she could not give the reasons why she was tested positively for the two substances. She indicated, however, that since her husband had left her in November/December 2007, an old health problem with her back from which she suffered since 2001 and which created a depression and panic attacks and forced her to undergo a therapy became acute and caused extraordinary pains to her. Ms Perotto submitted two medical certifications which documented the medical treatment she underwent. Both medical doctors had assured to her, however, that none of the medications prescribed by them contained one of the substances found in her bodily specimen. Ms Perotto stated further, that she has not taken any other medication with the exception of an integrator, the name of which she does not remember and which she ordered through the internet. She finished with this integrator by October 2008 and her participation at the race of Carpi. Ms Perotto mentioned also that at the end of January 2008 a young man, who was her boyfriend at that time, recommended her some pills which he took with him as anti-inflammatories. He gave her about 7 pills and recommended to her that she should take one per day. She has taken them immediately and did not explore which substances they contained. Since she has lost any contact to this man and since he is not living in her city Ms Perotto does not remember the name of this man.
7. The Anti-Doping Prosecutor Office of CONI draw the conclusion that the athlete did not submit any evidence to her favour, but formulated only hypotheses which were not sufficient to release her from her ultimate responsibility for all substances found in her bodily specimen. On 23 December 2008 the Anti-Doping Prosecutor Office of CONI found a case of violation of art 2.1.1 WADC given and transferred the case of Ms Perotto based on art 10.2 of the *Norme Sportive Antidoping* and art 4.6 of the *Procedimento disciplinare e Istruzioni operative relative all'attività dell'Ufficio di Procura Antidoping* to the Tribunale Nazionale Antidoping of CONI asking for imposing a sanction of two years of "*inibizione a rivestire in future cariche o incarichi in seno al CONI, alle FSN o DSA, ovvero a frequentare in Italia gli impianti sportivi, gli spazi destinati agli Atleti ed al personale addetto ovvero a prendere parte alle manifestazioni od eventi sportivi che si tengono sul territorio nazionale o sono organizzati dai predetti enti sportivi*" ("*inhibition [ineligibility] of taking a function or office at CONI, at a National Sport Federation or Associated Sport Discipline or*

frequenting sport facilities, areas assigned to athletes or support personnel in Italy or taking part at sport performances or sport events which are organised on the territory of Italy or by one of the above sport organisations.”)

8. Art 10 of the Norme Sportive Antidoping (CONI Sport Anti-Doping Rules) (version 23 January 2008) reads as follows:

“Art. 10

Individual Sanctions

1. *The matter of individual sanctions is defined by Article 10 of the Code (=WADC) and by the Sport Anti-Doping Norms. In competitions of subjects which are not members of a National Sport Federation or Associated Sport Discipline, as well as of foreign subjects, in case of a violation of the Sport Anti-Doping Norms, there can be imposed the measures of “inibizione” (ineligibility) of taking in future a function or office at CONI, at a National Sport Federation or Associated Sport Discipline or frequenting sport facilities, areas assigned to athletes or support personnel in Italy or taking part at sport spectacles or sport events which are organised on the territory of Italy or by one of the above sport organisations.*
2. *It is obligatory for National Sport Federations and Associated Sport Disciplines to observe the present article and to provide for the necessary acts for a maximum announcement, in particular with regard to athletes, athletes’ support personnel and sport community.*

In the following you find the Italian version of Article 10 of the WADC

Article 10 Individual Sanctions

10.1 Disqualification of Results in Event During which an Anti-Doping Rule Violation Occurs

.....

10.2 Imposition of “Squalifica” (Ineligibility) for Prohibited Substances and Prohibited Methods

Except for the specified substances identified in Article 10.3, the period of “squalifica” (ineligibility) imposed for a violation of Articles 2.1 (presence of Prohibited Substance or its Metabolites or Markers), 2.2 (Use or Attempted Use of Prohibited Substance or Prohibited Method) and 2.6 (Possession of Prohibited Substances and Methods) shall be:

- First violation: Two (2) years’ “Squalifica” (Ineligibility)*
- Second violation: Lifetime “squalifica” (Ineligibility).*

However, the Athlete or other Person shall have the opportunity in each case, before a period of “squalifica” (Ineligibility) is imposed, to establish the basis for eliminating or reducing this sanction as provided in Article 10.5.

The World Conference on Doping in Sport held in Lausanne in February 1999 supported the necessity of imposing a two year period of "squalifica" (Ineligibility) for a first serious anti-doping rule violation followed with a lifetime ban for a second violation. This consensus was reflected in the Olympic Movement Anti-Doping Code."

9. The Anti-Doping Prosecutor Office obviously referred to Art 4.6 of the *Procedimento disciplinare e Istruzioni operative relative all'attività dell'Ufficio della Procura Antidoping (Disciplinary Procedure and Operating Instructions with Regard to the Activity of the Anti-Doping Prosecutor Office)* in the version of Appendix F to the CONI Sport Anti-Doping Rules version of 23 July 2008. The version of 23 December 2008 deals in art 4.6 with the obligation of the competent judicial body of a National Sport Federation or Associated Sport Discipline to communicate, *inter alia* to WADA, the decision taken, within a maximum of 15 days after the hearing in a given case. The version of 23 January 2008 deals in art 4.6 with the application of arts 2.5, 2.6, 2.7 and 2.8 WADC.
10. Art 4.6 of the *Procedimento disciplinare e Istruzioni operative relative all'attività dell'Ufficio della Procura Antidoping (Disciplinary Procedure and Operating Instructions with Regard to the Activity of the Anti-Doping Prosecutor Office)* in the version of Appendix F to the CONI Sport Anti-Doping Rules version of 23 July 2008 reads as follows:

"In competitions of subjects which are not members of a National Sport Federation or Associated Sport Discipline, as well as of foreign subjects, the Anti-Doping Prosecutor Office can start a proceeding of inquiry and at the end of the inquiry, if this results in the finding of a given responsibility, ask the National Anti-Doping Tribunal to provide for imposing the measures of "inibizione" (ineligibility) of taking in future a function or office at CONI, at a National Sport Federation or Associated Sport Discipline or frequenting sport facilities, areas assigned to athletes or support personnel in Italy or taking part at sport spectacles or sport events which are organised on the territory of Italy or by one of the above sport organisations."
11. In a decision dated 26 January 2009 and communicated on 10 February 2009, the National Anti-Doping Tribunal (Tribunale Nazionale Antidoping, thereafter "TNA") of CONI imposed the sanction of "inibizione" *"for one year starting on 26/01/2009 and ending on 25/01/2010 of taking in future a function or office at CONI, at a National Sport Federation or Associated Sport Discipline or frequenting sport facilities, areas assigned to athletes or support personnel in Italy or taking part at sport spectacles or sport events which are organised on the territory of Italy or by one of the above sport organisations."*
12. The TNA did not follow the request of the Anti-Doping Prosecutor Office of CONI for imposing two years of such "inibizione", but applied art 10.5.2 WADC which is part of the CONI Sport Anti-Doping Rules and reads as follows:

"10.5.2 No Significant Fault or Negligence

This Article 10.5.2 applies only to anti-doping rule violations involving Article 2.1 (Presence of Prohibited Substance or its Metabolites or Markers), Use of a Prohibited Substance or Prohibited Method under Article 2.2, failing to submit to Sample

collection under Article 2.3, or administration of a Prohibited Substance or Prohibited Method under Article 2.8. If an Athlete establishes in an individual case involving such violations that he or she bears No Significant Fault or Negligence, then the period of "squalifica" (Ineligibility) may not be less than one-half of the minimum period of "squalifica" (Ineligibility) otherwise applicable. If the otherwise applicable period of "squalifica" (Ineligibility) is a lifetime, the reduced period under this section may be no less than 8 years. When a Prohibited Substance or its Markers or Metabolites is detected in an Athlete's Specimen (Sample) in violation of Article 2.1 (presence of Prohibited Substance), the Athlete must also establish how the Prohibited Substance entered his or her system in order to have the period of "squalifica" (Ineligibility) reduced."

13. The TNA held that at the hearing before it the athlete described the facts according to her view and finally explained the fact that she did not indicate the medications and integrators she had taken on the doping control form because of lack of knowledge of such requirement on her part. The TNA imposed a reduced sanction referring to the circumstances of the case, the personality of the athlete, the degree of fault and the behaviour of the athlete. It found that the version of the facts as described by Ms Perotto during the hearing does not release her of all fault, but reduces the degree of fault and allows imposing a reduced sanction.

III. PROCEEDINGS BEFORE THE CAS

14. On 11 March 2009, WADA filed a Statement of Appeal with the Court of Arbitration for Sport (hereinafter referred to as the "CAS"). It challenged the Appealed Decision of TNA, submitting the following request for relief:

- "1. The Appeal of WADA is admissible.*
- 2. The Decision of TNA rendered on 26 January 2009, as motivated on 10 February 2009, in the matter of Ms Elena Perotto is set aside.*
- 3. Ms Elena Perotto is sanctioned with a two-year period of ineligibility starting on the date on which the CAS award enters into force. Any period of ineligibility (whether imposed to or voluntarily accepted by Ms Elena Perotto) before the entry into force of the CAS award shall be credited against the total period of ineligibility to be served.*
- 4. All competitive results obtained by Ms Elena Perotto from 11 October 2008 through the commencement of the applicable period of ineligibility shall be disqualified with all of the resulting consequences including forfeiture of any medals, points and prizes.*
- 5. WADA is granted an award for costs."*

15. On 17 March 2009 Dr Ettore Torri informed CAS on behalf of CONI that "CONI will not actively take part in these proceedings. In this respect, we agree as from now with the appointment of arbitrator of Ms Elena Perotto.

However, as regards our position, please find attached the indictment of the Athlete submitted by UPA-CONI within the National Anti-Doping Tribunal. Should the Panel deem it necessary, we will provide a translation in English.” (see para 7 above).

16. Ms Elena Perotto sent the following letter to CAS c/o WADA on 29 May 2009, which was received by CAS on 4 June 2009:

“Dear Sirs,

Herewith I'm answering to your letter in object in which you stated that you don't accept the sentence of CONI court, which disqualified me for one year for doping taking.

I remind you once again that I'm a not professional athlete, riding only for pleasure, I'm 45 years old and for sure I didn't take any forbidden substances to modify my sports performances.

Thinking on my age I cannot look for a sports carrier neither for extraordinary results, as races I take part are always amateur ones.

So once again I repeat that I took only dietary supplements bought through web, anti-inflammatories and antidepressants that since few years I'm obliged to take because of chronic pains to “sacroiliaca”.

Now, due to economical reasons I cannot incur costs to come by your court in Lausanne neither costs for a lower (lawyer) representing me in another trial, as I have already the penal one of PROCURA ITALIANA pending, so against my will I accept whatever decision you'll take, trusting on an impartial judgment.

Best wishes”.

17. On 20 March 2009 WADA filed its Appeal Brief, containing a statement of the facts and legal arguments accompanied by supporting documents. WADA repeated its Prayer for Relief from its Statement of Appeal (see para 14 above).
18. WADA in its Appeal Brief found a violation of CONI's commitment with regard to the WADC as to the length of the sanction imposed by TNA on Ms Perotto. WADA did not see that the type of sanction imposed by TNA was not “*squalifica*”, which would correspond to the ineligibility to be imposed according to art 10.2 WADC, but “*inibizione*” as laid down in the introductory paragraph of art 10 Sport Anti-Doping Norms (see para 8 above).
19. The Panel having taken into consideration that none of the parties requested a hearing and, thus, decided to rule on the case without a hearing, discussed the issue of the difference of the two types of sanctions, informed the parties on 26 June 2009 of its opinion and asked them to express their views by the deadline of 10 July 2009.
20. Only WADA answered to this request. By letter dated 7 July 2009 WADA wrote in particular:

"6. In certain cases, contemplated by Article 10, second sentence, of the CONI Anti-Doping Rules, the sanction applicable under the CONI Anti-Doping Rules is defined as a "ban from holding offices or positions within the CONI, the National Sports Federations or the Associate Sports Disciplines in the future, from frequenting sports facilities, as well as areas designed for Athletes and related personnel, in Italy, and from participating in sporting events or activities, which are held on the national territory or organized by the above-mentioned sports institutions;

7. This clearly falls within the scope of the ban from participating in competitions or other activities (emphasis added);

8. The definition set out in Nr. 6 above must therefore be understood as a clarification of what is to be intended by Ineligibility under Article 10.2 of the Code in the cases contemplated by Article 10, second sentence, of the CONI Anti-Doping Rules;

...

13. WADA's appeal is essentially directed at the duration of the sanction imposed;

...

16. Nevertheless, in addition to the above, it must be noted that the use by WADA of the word Ineligibility is also intended to clarify the material and geographical scope of the sanction; to the extent the sanction consists in a ban of the above-mentioned activities only, and/or in a ban valid in Italy only, it is not in compliance with the framework of the Code, which requests sanctions that are enforceable worldwide; WADA is of the opinion that the imposition on Ms. Elena Perotto of a sanction defined generically as Ineligibility should clarify this point;

*17. Should the Panel consider that the Ineligibility must be understood, in the case of Ms. Perotto, as a mere "ban from holding offices or positions within certain sports institutions in future, from frequenting sports facilities, as well as areas designed for Athletes and related personnel, in Italy, and from participating in sporting events or activities, which are held on the national territory or organized by the above-mentioned sports institutions," therefore issuing an award *infra petita*, WADA submits that such an award would be contrary to Article 10 of the Code, which does not provide for a possibility to reduce the territorial scope of sanctions for violations of anti-doping rules; the CONI has adopted the Code, and its own anti-doping rules must therefore be compliant with those of the Code; this implies that the CONI rules must be interpreted in accordance with the principles of the Code."*

21. The Panel, having discussed the answer of WADA on 16 July 2009, decided to ask CONI to comment on the letter of WADA dated 7 July 2009 and, in particular, to explain to the Panel within 15 days upon receipt of the Panel's letter the following:

"- The difference(s) between the concepts of the sanction of "inibizione" and the one of "squalifica" according to CONI's understanding;

- The reasons why the Tribunale Nazionale Antidoping has chosen to apply the sanction of "inibizione" in the given case;

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- *If applicable, whether and why CONI considers in the present case the sanction of "inibizione" for a period of one year to be in accordance with the World Anti-Doping Code."*

22. CONI answered to the above questions by letter dated 28 July 2009 and submitted in essence:

- Ms Perotto, being a member of the Sport Promotion Corporation UDACE which in turn is member of the Sport Promotion Corporation of CSAIN, which is recognised as such by CONI, does not have the status of a member ("soggetto tesserato") of either a National Sport Federation or an Associated Sport Discipline of CONI. *"Therefore, TNA has not jurisdiction to impose Ms. Perotto the sanction of "squalifica", given that such measure is allowed only for athletes "tesserati". Indeed, it is not possible to suspend the activity of someone who is not member of CONI and its FSN or DSA."*
- Art 4.6 of the Procedimento disciplinare e Istruzioni operative relative all'attività dell'Ufficio di Procura Antidoping read together with art 1 of the Istruzioni operative del TNA are the legal basis for the TNA having imposed the sanction of "inibizione", because *"at the root of the relationship that exists as between Ms. Perotto and CONI, there is no the contract relationship between an athlete and a national sport organization. In other words, in the matter at stake there is no the power of sport association to sanction one of its members, but the full power of a sport entity to adopt protective measures in order to keep out from its activity, events and organization a person, who committed serious misconduct."*
- CONI is of the opinion that "inibizione" *"is a measure able to keep out individuals manifestly guilty of anti-doping violations in order to protect and safeguard the Italian Sport system of CONI"*. Thus, this type of sanction is considered to be in line with protecting and safeguarding the Italian Sport system of CONI.
- CONI does not see particular differences between the sanctions of "squalifica" and "inibizione" at national level, because the principle of status during ineligibility as laid down by art 10.9 WADC states that *"a person who has been declared Ineligible may not participate in a competition or activity authorized or organized by any Signatory or Signatory's member organization"*.
- TNA sanctioned Ms Perotto as set forth in art 4.7 Provvedimento disciplinare ed Istruzioni operative relative all'attività dell'Ufficio di Procura Antidoping.
- *"Lastly, with reference to the duration of the sanction, we point out that UPA – CONI ... indicted Ms. Perotto requesting two years of inibizione. However, the TNA deemed that the particular subjective status of the Athlete – at that time influenced by some psychological factors – might constitute a case of "No Significant Fault of (or) Negligence" according to art 10.5.2 of the WADA Code. In this respect, we note that in the grounds of the Appealed Decision, the hearing body explained, inter alia, to have formed its conviction about the*

athlete's fault after her statement at the hearing."

23. After careful analysis of the letter of CONI, the Panel gave to WADA and to Ms. Perotto, by letter of 3 August 2009, the possibility to comment on the CONI letter on or before 12 August 2009.
24. WADA with its Letter of 12 August 2009 maintained its position, claiming among others that the distinction between "squalifica" and "Inibizione" is irrelevant.
25. With regard to the length of the sanction the submissions of WADA in its Appeal Brief, in essence, may be summarized as follows:
 - *"According to Nr ix.e) of the Preamble to the CONI Anti-Doping Rules, the sanctions are governed by article 10 of the Code ... The period of ineligibility for a first offence of presence of a prohibited substance in an athlete's sample is a minimum of two years as provided for by article 10.2 of the Code ... The sanctions would not be milder under the 2009 rules."*
 - In order to benefit from a reduction under art 10.5.2 WADC, Ms Perotto had to establish first how the prohibited substance entered her system. She explained that *sum* drugs were prescribed to her by doctors, whereby they assured that none of such drugs contained the prohibited substances found in her sample.
 - Ms Perotto further noted that, at the end of January 2008, she took some anti-inflammatory pills given to her by a then boyfriend with whom she has lost any contact.
 - Ms Perotto admitted having taken, until the time she participated in the competition during which she was tested positive, some integrators that she bought on the Internet, but which she could not name and which she did not mention on the occasion of the test.
 - *"It is further noted that Ms Perotto mentioned such integrators as a mere hypothesis, without being able to clarify whether they were the cause for the presence of the prohibited substances in the bodily sample taken on 11 October 2008 ... Her explanations were not supported by any evidence. ... Based on a balance of probabilities ..., Ms Elena Perotto failed to demonstrate how the detected substances entered her body. The exception set forth in article 10.5.2 of the Code is therefore not applicable and the ordinary two-year period of ineligibility must apply."*
 - In the event, the Panel were to find that Ms Perotto has established how the prohibited substances entered her system, *"WADA is of the opinion that Ms Elena Perotto did not bring satisfactory evidence showing that she bears no significant fault or negligence."*
 - WADA adduces the definition of *"No Significant Fault or Negligence"* from the WADC which show that a benefit of reduction of the otherwise applicable period of ineligibility *"is meant to occur only in cases where the circumstances are truly exceptional, i.e. when an athlete can show that the degree of fault or negligence in*

the totality of the circumstances was such that it was not significant in relation to the doping offence. ...”.

- WADA refers to CAS case law with regard to nutritional supplements, where CAS has always been reluctant to accept a no significant fault or negligence “*in view of the numerous warnings of the well-known risks linked to the use of such substance.*” “*... if an athlete ingests a product failing to inquire or ascertain whether the product contains a prohibited substance, such athlete’s conduct constitutes a significant fault or negligence ...”.*
- “*In the present case, and notwithstanding the fact that Ms Elena Perotto alleged that she was in a state of personal distress with panic crisis due to her back pain and the fact that her husband had left her in November-December 2007 ..., she failed the test of “no significant fault or negligence” for the following reason: even if the integrators that Ms Elena Perotto took were actually the reason why she was tested positive to 19-norandrolone and 19-noretiocholanolone, Ms Elena Perotto admitted taking such integrators without even alleging that she had made any effort at all to clarify whether they could affect her sports performance or contain a prohibited substance. ...”.* ... “*Ms Elena Perotto has not established that she took any precaution before consuming the integrators which she refers to. She therefore failed to establish exceptional circumstances whereby she would bear no significant fault or negligence.*”

IV CAS JURISDICTION

26. The jurisdiction of the CAS, which is not disputed, derives from art 3.24 of Appendix H (Istruzioni Operative del TNA: Operating Instructions for the TNA) to the CONI Sport Anti-Doping Rules (version of 23 July 2009 = art 3.22 version of 23 December 2008). This provision reads as follows:

“All decisions taken by TNA can be appealed by the interested parties to the CAS, based on its provisions within 30 days after receipt of the decision including the reasons therefore.”

27. The Istruzioni Operative del TNA considers WADA to be an interested party, as can be seen, *inter alia*, from the provision of art 4.1 ruling on the obligation for TNA to notify its decisions to WADA. There is no doubt that the TNA is the final body to decide under the CONI Sport Anti-Doping Rules and that its decision is a “*decision of a federation*” in the understanding of art R47 of the Code of Sports-related Arbitration (“Code”).
28. WADA received the fully motivated decision by fax of CONI on 11 February 2009 and filed its Statement of Appeal, therefore, timely on 11 March 2009. Also the Appeal Brief was filed within the ten-day-time limit provided for under art R51 of the Code of Sports-related Arbitration.
29. For all the above reasons, the Panel holds that the appeal of WADA is admissible.

V APPLICABLE LAW

30. Article R58 of the Code provides the following:

“The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.”

31. It follows that the Norme Sportive Antidoping (Sport Anti-Doping Rules) of CONI in connection with the WADC, to which they are referring to according to arts i and ix e) of its Preamble, and Italian law are applicable to the present case.

32. Art i of the Preamble of the Sport Anti-Doping Rules of CONI (version of 23 July 2008) reads as follows:

“The Italian National Olympic Committee (“CONI”) is a public entity which takes care in Italy for the organisation and intensification of the national sport, as well as for the adoption of measures for the prevention and suppression of doping in the field of the sports order.

CONI has adopted the World Anti-Doping Code and is in Italy the National Anti-Doping Organisation (“NADO”) recognized by WADA.

The NADO is the national entity with the supreme authority and responsibility with regard to the adoption and implementation of the Sport Anti-Doping Rules, including the direction for the taking of samples, for test results management and the conduction of proceedings.”

33. Art ix e) of the Preamble of the Sport Anti-Doping Rules of CONI (version of 23 July 2008) reads as follows:

“the matter of individual sanctions is defined by art 10 WADC, which does not touch at the special provisions for violation of the articles 2.9 – 2.11. In competitions of subjects which are not members of a National Sport Federation or Associated Sport Discipline, as well as of foreign subjects, in case of a violation of the Sport Anti-Doping Norms, there can be imposed the measures of ineligibility of taking in future a function or office at CONI, at a National Sport Federation or Associated Sport Discipline or frequenting sport facilities, areas assigned to athletes or support personnel in Italy or taking part at sport spectacles or sport events which are organised on the territory of Italy or by one of the above sport organisations.”

34. In the version of 23 December 2008 art ix e) of the Preamble of the Sport Anti-Doping Rules of CONI has been changed as follows:

“the matter of individual sanctions is defined by art 10 WADC, which does not touch at

the special provisions for violation of articles 3 ff.”

35. At the moment when the anti-doping rule violation occurred (11 October 2008) the WADC 2003 was in force. According to art 25.2 WADC 2009, which entered into force on 1 January 2009, the substantive anti-doping rules in force at the time when the anti-doping rule violation occurred shall be applied “*unless the panel hearing the case determines the principle of “lex mitior” appropriately applies under the circumstances of the case*”. The Panel finds that the differences of arts 10.2 and 10.5.2 in the Code version 2003 and that one of 2009 are of no legal relevance in the present case, as the prohibited substances found in the sample of Ms Perotto are no specified substances. Thus, the substantive provisions of the WADC 2003 are to be applied, whereas the procedural rules – as far as relevant for the present case – are identical in the July 2008 and December 2008 versions of the CONI Sport Anti-Doping Rules.

VI THE MERITS

1. ESTABLISHMENT OF ANTI-DOPING RULE VIOLATION

36. It is undisputed that 19-norandrosterone and 19-noretiocholanolone have been found in the bodily sample taken from Ms Elena Perotto on 11 October 2008. Both substances are Endogenous Anabolic Androgenic Steroids falling under class S1 Anabolic Agents which have been reported by the Laboratorio Antidoping FMSI in Rome as Adverse Analytical Finding on 27 October 2008. Only for 19-norandrosterone the laboratory reported the concentration (> 2 ng/ml). For 19-noretiocholanolone the laboratory did not explain in its report why it could not be considered as endogenously produced. As Ms Perotto did not question this issue and ask for further explanation the Panel holds that the presence of two forbidden substances was established fulfilling all requirements as laid down on page 3 for an endogenous AAS on the 2008 as well as 2009 WADA List of Prohibited Substances.
37. Since Ms Elena Perotto is not under the benefit of any Therapeutic Use Exemption, the Panel finds that the violation by Ms Elena Perotto of art 2.1 WADC 2003 which according to art 2.1 CONI Sport Anti-Doping Rules version 23 January 2008 is to be applied directly, whereas art 2.1. WADC 2009 has been transformed into art 2.1 CONI Sport Anti-Doping Rules version 23 July 2008 (=version of 23 December 2008), has been established.

2. DETERMINATION OF SANCTION

38. As the Gran Fondo d'Italia in Carpi 2008 was neither organised by a National Sport Federation, nor by an Associated Sport Discipline the TNA of CONI, in accordance with the introductory part 1 of art 10 CONI Sport Anti-Doping Rules, applied *art 4.6 of the Procedimento disciplinare e Istruzioni operative relative all'attività dell'Ufficio della Procura Antidoping as in effect at the respective time* and imposed an “*inibizione*” instead of a “*squalifica*”, but applied art 10.5.2 WADC 2003 for reducing the otherwise applicable period of two years to one year, in accordance with art. 2.11 of the *Norme Sportive Antidoping, Documento tecnico attuativo del Programma Mondiale Antidoping WADA*.

39. The Panel was informed by CONI that the TNA could only apply the sanction of "*inibizione*" instead of "*squalifica*" with reference to art 1 Istruzioni operative del TNA (Operating Instructions of the TNA), because Ms Perotto is not a "licensed athlete", i.e. she is not "*tesserata*" to a FSN or DSA (member of a FSN or DSA). Art 1 Operating Instructions of the TNA reads as follows:

"The TNA decides as second and last instance all procedures in matters relating to members of FSN or DSA. The TNA decides in one instance all procedures of subjects being no member of FSN and DSA as well as of foreign subjects and of international level athletes or matters of doping with regard to competitions or activities in connection with an international sport event."

40. Irrespective of WADA having emphasized in its letter dated 7 July 2009 that it did not want to object to the TNA of CONI having imposed the sanction of "*inibizione*", but just to the duration of this sanction, the Panel notes that WADA neither in its Appeal Brief nor in its Statement of Appeal has deemed necessary to comment on the application of art. 4.6 of the *Procedimento disciplinare e Istruzioni operative relative all'attività dell'Ufficio della Procura Antidoping* on which the Appealed decision is based.
41. The Panel shares the view of CONI that CONI has the power to keep out of its activities athletes, doctors, coaches, and any other individual that has proven to have committed a serious misconduct and, lacking any affiliation with CONI or with a relevant Sport federation, cannot be disqualified. This is explicitly foreseen in art. 2.11 of the *Norme Sportive Antidoping, Documento tecnico attuativo del Programma Mondiale Antidoping WADA*. Additionally, CAS jurisprudence has recognized the validity and the rationale of the sanction of *inibizione* (cf. CAS 2008/A/1698, Riccò c. CONI, N 67 ff.; CAS 2007/A/1433, Di Luca c. CONI, N 47; see also CAS 2008/A/1563, Rivellini c. CONI and CAS 2008/A/1646, D'Andrea c. CONI). And while the sanction of *inibizione* can be added in those cases in which the subject that committed the misconduct is a licensed athlete, it comes in favour of an efficient battle against anti-doping and other misconducts that a Sport Federation will be able to protect itself versus a subject that by non being member of that Federation cannot be sanctioned with a disqualification.
42. As mentioned above, Ms Perotto is a member of the ASD Pedale Feltrino Team Bunny Hop in Feltre which is affiliated with UDACE. UDACE is a member of CSAIN, which has been recognized by CONI as a sport promotion corporation under title 6 of its Statutes. However, as stated in the letter of CONI, and after careful review of all information and evidence submitted by the parties, the Panel is satisfied that such kind of membership of Ms. Perotto is not equal to a "licensed membership" (i.e. a "*tesseramento*") with an Italian Sport Federation or an Associated Sport Discipline of CONI. Thus, in accordance with art. 2.11 of the *Norme Sportive Antidoping, Documento tecnico attuativo del Programma Mondiale Antidoping WADA*, the TNA was right in applying the sanction of *inibizione* as per art. 4.6 of the *Procedimento disciplinare e Istruzioni operative relative all'attività dell'Ufficio della Procura Antidoping* and WADA did not submit any argument to support a different status of Ms Perotto and a sanction of disqualification, respectively. Therefore, the Panel follows past CAS jurisprudence relating to CONI matters according to which in a case where an athlete is not or not anymore a "*soggetto tesserato*", no other sanction is possible than a

sanction of *inibizione* (so explicitly CAS 2008/A/1646, D'Andrea c. CONI, N 49, and CAS 2008/A/1563 Rivellini c. CONI, N 75).

3. DURATION OF THE SANCTION AND REDUCTION OF SANCTION UNDER ART 10.5 WADC

43. The period of *inibizione* for a first offence of presence of a prohibited substance in an athlete's sample due to art. 2.11 of the *Norme Sportive Antidoping, Documento tecnico attuativo del Programma Mondiale Antidoping WADA* and the analogous application of art 10.2 is a minimum of two years.
44. According to the jurisprudence of CAS an athlete, in order to profit from a reduction of the otherwise applicable period of sanction according to art 10.5 WADC, must prove by a balance of probability, how the prohibited substance entered her body (see eg CAS 2007/A/1399 WADA v/FILA & Stadnyk at para 96).
45. Ms Perotto did neither provide the TNA of CONI, nor the CAS Panel with such evidence. She presented hypotheses, but withheld information which could amount to adducing the necessary evidence. Thus, she did not disclose the names of the integrators and the source of their purchase on the internet, but admitted that she had been taking these integrators until the time she participated in the competition during which she was tested. Since Ms Perotto also did not indicate these integrators on the doping control form, Ms Perotto did not provide any evidence on whether these integrators were the reason for how the prohibited substances entered her body.
46. Further, Ms Perotto admitted that she received anti-inflammatory pills from her then boyfriend at the end of January 2008 and used them, but showed unable to disclose his name or give any additional information with regard to the name of such pills and their ingredients, as well as with regard to the time when she used such pills.
47. The TNA has deemed that a reduction of the sanction was appropriate, basically because of the particular psychological and subjective status of Ms Perotto. The Panel is certainly aware that a particular personal situation may put an athlete under a particular pressure. However, the factors set out in the Appealed Decision and also highlighted in the CONI letter of 28 July 2009, do not, in view of the Panel, justify an application of art 10.5.2 WADC.
48. In view of the above, the Panel holds that Ms Elena Perotto did not prove by a balance of probability, how the prohibited substance entered her body. Notwithstanding the fact that Ms Perotto has been obviously believed by the TNA of CONI having been in a state of personal distress with panic crisis due to her back pain after her husband has left her in November – December 2007, she did not fulfil the basic requirement for applying art 10.5.2 WADC on her sanction. The medications confirmed by her doctors were expressly excluded by them of containing any of the forbidden substances. In addition, Ms Perotto, even during the hearing before the TNA, confessed that she could not explain why she was tested positive. Thus, the Panel does not see a necessity to analyse whether Ms Perotto bore no significant fault or negligence. The Panel does not see any legitimacy for reduction of the otherwise applicable period of ineligibility of two years.

49. Based on its authority under art R57 of the Code, the Panel, thus, imposes a period of two year of *inibizione*, which shall start on 26 January 2009, as originally requested by the Anti-Doping Prosecutor Office.

4. OTHER PRAYERS FOR RELIEF

50. The above conclusion, finally, makes it unnecessary for the Panel to consider the other requests submitted by the parties to the Panel. Accordingly, all other prayers for relief are rejected, including WADA's request that the sanction be at least worded as to be enforceable worldwide.

VII. Costs

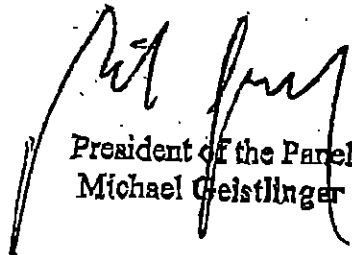
51. Articles R65.1 and R65.3 of the Code provide that, subject to articles R65.2 and R65.4, the proceedings shall be free; that the costs of the parties shall be advanced by the parties; and that, in the Award, the Panel shall decide which party shall bear them, or in what proportion the parties shall share them, taking into account the outcome of the proceedings, as well as the conduct and financial resources of the parties.
52. In the present case, the appeal of WADA is partially upheld. Taking into consideration, however, that WADA failed to clarify the issue of the difference between the sanctions of "*inibizione*" and "*squalifica*", and taking into consideration the financial situation of Ms Perotto the Panel does not award WADA a contribution to its costs.
53. The Panel, thus, rules that all Parties shall bear all of their own legal fees and other expenses incurred in connection with this arbitration. The Court Office fee of CHF 500 (five hundred Swiss Francs) already paid by the Appellant shall be retained by the CAS.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal of WADA against the decision of the TNA of CONI dated 26 January 2009 is declared admissible and partly upheld.
2. The Panel imposes a period of two year ineligibility ("*inibizione*"), which shall start on 26 January 2009.
3. This award is pronounced without costs, except for the Court Office fee of CHF 500 (five hundred Swiss Francs) already paid by the Appellant and to be retained by the CAS.
4. All parties shall bear their own legal and other costs.
5. All other motions or prayers for relief are dismissed.

Done in Lausanne, on 28 August 2009

THE COURT OF ARBITRATION FOR SPORT

President of the Panel
Michael Geistlinger